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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 926.

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE.

PETITIONER.

v.

MARY ADELAIDE POOR et al, SURVIVING EXECUTORS OF THE WILL OF ADELAIDE J. SARGENT,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

ARGUMENT.

The decision of the Circuit Court of Appeals for the First Circuit in this case is not in conflict with the decision of any other Circuit Court of Appeals in construction of Section 302 (d) of the Revenue Act of 1926.

The decision of the Circuit Court of Appeals was that the power of the trustees of the Sargent Trust to terminate the trust was not within the scope of Section 302 (d), because it was not a power to revoke.

A brief examination of the facts will show that this decision involves no construction of Section 302 (d) which is in conflict with the construction placed upon it by any other Circuit Court of Appeals or with principles established by this Court. The power in the Sargent Trust, which was in terms a power to terminate the trust as to all or any part of the trust property, was given to the persons who should be trustees at the time of any exercise of it (Record, p. 18). The decedent's right to share in the exercise of the power was hers solely because of the fact that she was one of the trustees, and the continuance of this right in her was wholly dependent upon her continuing to hold the office of trustee. When she resigned in 1920 her right to share in any exercise of the power ceased. When she was reappointed by others in 1921, she regained the right to share in the exercise of the power. At the time of her death her right to share in the exercise of the power was derived, not from any reservation of power to herself at the time of creation of the trust, but from an appointment as trustee made later by persons over whom she had no powers of control. The power of the trustees to terminate was not limited to her life time but continued in surviving and succeeding trustees unaffected by her death, except that her death put an end to the possibility of reconveyance to her on any termination.

When these facts are taken in connection with the fact that at no time prior to her death could the power have been exercised without the voluntary joinder therein of two other trustees one of whom was a principal beneficiary whose interests were adverse to any termination during her life time, it seems clear that the word "revoke" used in its broadest sense is not fairly descriptive of or applicable to this power.

The determination that this power was not within the scope of Section 302 (d) did not involve reading into that

section any such qualification of the words "any person" as the Circuit Courts of Appeals for the Seventh Circuit considered unwarranted in *Commissioner of Internal Revenue* v. *Strauss* and the decided facts of the case at bar are so different from those of the last cited case that there is no actual conflict between the two decisions. In the cited case the power was contained in a trust indenture executed by the settlor and his wife and was in the form of an agreement that,

> ". . . this instrument and all the rights, powers, prerogatives, therein granted and all duties or obligations imposed upon either of the parties hereto, *may be cancelled, revoked and terminated upon the mutual consent of the parties hereto;* in which event said trust estate shall again revert to said first party, to have and to hold the same in precisely the same manner as though this instrument had not been executed." (Italics supplied).

The only substantial point of similarity of this power with the power in the case at bar was the fact that it could not be exercised without the joinder of a beneficiary, whose interest appears to have been adverse to termination. It is submitted there is no actual or necessary conflict between the decision of the Court in the cited case and the decision in the case at bar.

The facts outlined above also differentiate the case at bar from *Commissioner of Internal Revenue* v. *City Bank Farmers Trust Co.*, 74 F. (2d) 242, and *Helvering* v. *Helmholz*, 75 F. (2d) 245, in which petitions for certiorari have been filed.

The decision of the Circuit Court of Appeals in the case at bar that the decedent's transfer in trust was a complete transfer of all her interest in the corpus of the trust property and beyond her power to recall at the date of execution of the trust instrument, in 1919, is in full accord with the

principles laid down and applied in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, and in *McCormick* v. *Burnet*, 283 U. S. 784 (for facts see *Commissioner of Internal Revenue* v. *McCormick*, 43 F. (2d) 277), and recently recognized as still applicable in *Porter* v. *Commissioner*, 288 U. S. 436.

It seems proper to point out, as a further reason why certiorari should not be granted, that the application of the provisions of Section 302 (d) to impose or measure an estate tax upon this decedent's estate by reason of her transfer in trust, fully completed several years before these or any similar provisions became part of the estate tax law, would be an unconstitutional exercise of the taxing power since it would be the taxing of a transfer by legislation enacted after the privilege of transfer has been fully exercised. It is settled that it is beyond the power of Congress to impose such a tax.

Nichols v. *Coolidge*, 274 U. S. 531.
Untermeyer v. *Anderson*, 276 U. S. 440
Coolidge v. *Long*, 282 U. S. 582.
Blodgett v. *Holden*, 275 U. S. 142.

This constitutional question was in issue and was argued both before the District Court and before the Circuit Court of Appeals. Upon this point it was said by the Judge of the District Court:

> "If it were necessary to hold the transfer in question as one within 302 (d), I am unable to see how one can escape the conclusion that the statute, when applied to a transfer wholly completed before the enactment of the law, would be beyond the powers of Congress." Record, p. 48.

The Circuit Court of Appeals expressed no opinion upon this question, resting its decision wholly upon the point that the power to terminate the trust was not a power to alter,

amend or revoke within the scope and meaning of Section 302 (d).

It is respectfully submitted that no useful purpose would be accomplished by a review of this case on certiorari.

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